discussed and the leading authorities referred to. We can entertain no question of the entire soundness of the decision. We know that wagers at common law were held valid, unless in some way against public policy, either in the subject-matter or the contemplated mode of consummation. This exception, as stated in the opinion, has, from time to time, been so enlarged as to become the general rule, both in England and America. Some of the states have expressly decided that all wagers are illegal. *Collamer* v. *Day*, 2 Vt. 144, and other similar cases might be referred to. Stockjobbing, or dealing in differences, has now become the chief business of the stock exchange, in our country, if we exclude speculations in gold, which are conducted in the same manner, and can only be cured by restoring the currency to the specie basis; this demoralizing and degrading species of wagering or gambling, is no doubt, generally reprobated by the lovers of morality and decency throughout the country; but we do not seem to approach even toward its extinction. The English Statute 7 Geo. 2, c. 8, made perpetual by 10 Geo. 2, c. 8, is directed exclusively against such dealing in the public stocks of the country. These statutes make all contracts for the sale of public stocks to be delivered at a future day, when the seller had no such stocks at the date of the contract and none were ever intended to be transferred under it, but only the payment of differences, illegal and void; railway shares were held not within the statute: *Hewett* v. *Price*, 4 M. & G. 355; *Fisher* v. *Price*, 11 Beavan 194. But this statute was not intended to affect *bonâ fide* sales of public stocks, Lord ABINGER, C. B., in *Mortimer* v. *McCullom*, 6 M. & W. 69. But in a later case, *Grizewood* v. *Blain*, 11 C. B. 538, it was held that a sale of railway shares to be delivered in future, where only differences were expected to be paid, was gaming, within 8 & 9 Vict. c. 109, § 18. And we think it is generally considered in this country that all mere speculations in differences upon the stock exchange is gaming, and as such illegal. And it requires little wisdom or comprehension to see that similar contracts in the staple products of the country are none the less corrupting and immoral. We do not, of course, know what effect it will be likely to produce, when all such speculating contracts are condemned by the courts, as a species of gaming. The love of gaming, in some form, is deeply rooted in civilization; and Christianity seems not essentially to lessen its force or prevalence. But it is something to know, and feel, that the thing is illegal and immoral in whatever form disguised.

I. F. R.

Supreme Court of Missouri.

DEGIVERVILLE ET AL. *v.* DEJARNETTE ET AL.

The late war between the United States and the Confederate States, was a public war in such sense that all the people of one section were public enemies of the people of the other section.

An alien enemy, though he may not sue, may be sued and his property within reach of process subjected to execution during the war.

The right of a mortgagee under a power in the mortgage to sell the mortgaged premises in case of default, is not impaired or suspended by the war, on account of the voluntary residence of the mortgagor in the hostile section.

Notice required under a power of sale in a mortgage is not for the benefit of the mortgagor in the sense of notice to him. It is only to secure his right to a fair sale of the property.

ERROR to St. Louis Circuit Court.

The petition set out a purchase by the plaintiffs from the defendants in the year 1857 of certain real estate in the city of St. Louis, and the giving of notes for the consideration, secured by deed of trust, payable in one, two, three and four years, the last becoming payable on the 30th of April 1861; a failure to pay the last note and a sale by the trustee in consequence, on the 9th of June 1861, after publication of notice as required by the deed of trust. It was alleged that all the notes were paid except that which matured on the 30th of April 1861, and that the plaintiffs were ready and willing to pay this also, but were prevented by a state of war, existing at that time, between the United States of America, of which Missouri was a part, and the Confederate States, of which Virginia was a part; and that the plaintiffs were in 1857, and in 1861, and during the whole of the war which followed, citizens and residents of the county of Caroline, Va. By reason of the war existing it was alleged that the notice and sale under the deed of trust were fraudulent and void. It was averred that as soon as peace was restored, the plaintiffs tendered to the purchaser of the land the amount due under the deed of trust, which was refused, and they prayed that the deed made by the trustees under the sale of June 9th 1861, be set aside and annulled. To this petition the defendants demurred, assigning for causes of demurrer that the petition showed no cause of action; that it appeared that at the time the default was made there was no suspension of intercourse between the citizens of Virginia and those of Missouri, and that even when the sale was made under the deed of trust, there was no such suspension, and that there was no excuse for the non-payment of the note of the plaintiffs. The court below overruled the demurrer and gave judgment for the plaintiffs.

The opinion of the court was delivered by

WAGNER, C. J.—Whether there was any real or actual suspension of the relations theretofore existing prior to the Act of Congress of July 12th 1861, empowering the President to prohibit, by proclamation, all commercial intercourse between the rebellious and

the loyal states, and the proclamation of the President in pursuance thereof, issued August 16th 1861, I will not stop to inquire. The case has been argued here upon the theory that at the time the sale took place, Virginia had passed her ordinance of secession, and was out of the Union, and was among the number waging war against the general government. If so, her citizens were entitled to belligerent rights, and were clothed with all the characteristics of alien enemies.

Since the decisions in the Supreme Court of the United States in the cases of *The Venice*, 2 Wall. 258; *Mrs. Alexander's Cotton*, 2 Wall. 404; *Manson* v. *Insurance Company*, 6 Wall. 1; *The Ouachita Cotton*, 6 Wall. 521; *Hunger* v. *Abbott*, 6 Wall. 532; *Coppell* v. *Hall*, 7 Wall. 542; *McKee* v. *United States*, 8 Wall. 163; and the *United States* v. *Grossmayer*, 9 Wall. 72, the question must be regarded as settled, that the late war between the Confederate States and the United States was a public war, and a war, not only between the respective governments, but between all the inhabitants of the one territory on the one side and all the inhabitants of the other territory on the other side, so that all the people of each occupied the respective positions of enemies during the continuance of the war.

The consequence of a state of war is the interruption and interdiction of all commercial intercourse, correspondence and dealing between the subjects of the hostile countries. Kent says the interdiction flows necessarily from the principle that a state of war puts all the members of the two nations respectively in hostility to each other, and to suffer individuals to carry on a friendly and commercial intercourse while the two governments were at war would be placing the act of government and the acts of individuals in contradiction to each other: 1 Kent Com. 66.

As a corollary of this doctrine the principle is well established that an alien enemy cannot sue a friendly citizen in the courts of the latter's country: Bac. Abr. *Alien* D; *Alcinous* v. *Nigren*, 4 El. & Bl. 217; *De Wahl* v. *Braune*, 1 H. & N. 178; *Whelan* v. *Cook*, 29 Md. 1; *U. S.* v. 1756 *Shares of Stock*, 5 Blatch. 231. His disability is temporary in its nature, and personal, and founded upon reason and policy, and in a great measure upon necessity. But no such reason or policy forbids judicial proceedings against an alien enemy in favor of a friendly citizen, and the rule is there-

fore settled that while an alien enemy may not sue, he may be sued at law.

The question has frequently been brought up in our courts in regard to matters arising out of the late rebellion, and adjudications in the courts of last resort have all been in accordance with the principles above announced.

In *Mixer et al.* v. *Sibley*, 53 Ill. 61, it was decided that when a party residing in the state of Illinois holding a promissory note against a person residing in one of the states in rebellion, in the year 1862, after the Act of Congress and the President's proclamation prohibiting commercial intercourse between the adhering states and those in rebellion, commenced a suit thereon by attachment, which was levied on real estate situated in that state belonging to the maker, and obtained a judgment and procured a sale to be made of the premises attached, that the court had jurisdiction of the cause, and the judgment and proceedings thereunder were valid and binding, notwithstanding the defendant resided in one of the rebellious states, and the war at the time was in active progress.

In the case of *Dorsey* v. *Kyle et al.*, 30 Md. 512, the court holds that a person who, by his own voluntary act, assumed the attitude of an alien enemy to his state and to the government of the United States, going from Maryland to Virginia during the late civil war, allying himself with the Southern cause and joining the Confederate army, cannot claim exemption from process of attachment in behalf of antecedent creditors, against his property remaining in the state, on the ground that he was an alien enemy, and that all legal remedies were suspended during the period of hostilities. It is emphatically declared that neither reason nor policy forbids judicial proceedings against an alien enemy in favor of a friendly citizen, and therefore while an alien enemy may not sue he may be sued at law. The same question again arose in *Dorsey* v. *Dorsey*, Id. 522, and the same principle was again asserted and reaffirmed.

The same conclusion was arrived at in the case of *Thomas v. Mahone*, in the Court of Appeals of Kentucky (12 Am. Law Reg., N. S. 433). There the Civil Code of Kentucky authorized the creditors of a citizen who departed from the county of his residence and remained absent thirty days within the Confederate lines, to attach his property and sell the same for the payment of their debts. The

plaintiff left his home and joined the Confederate service, and while so absent attachments were procured and his property sold, and the court held that the fact that the debtor was a soldier in the Confederate army would not deprive the court of jurisdiction under the Code. LINDSAY, J., in delivering the opinion of the court, pointedly remarks: "It does not follow because appellant was at the time a soldier in the army of the belligerent power, and that all unlicensed communication with him by the people of the states adhering to the Federal Union was inhibited, not only by the laws of war but by express statute, that resident creditors might not sue him in the courts of this state and subject to the judgment of their debts such of his property as might be found within the local jurisdiction of the courts in which he was sued. The right of resident creditors so to proceed against parties indebted to them residing within the lines of the hostile power and held to be public enemies by reason of their participation in the Southern movement, was recognised by the Federal Congress in the Act of March 3d 1863 (2 Bright. Dig.1238), providing for the seizure and confiscation of the property of such persons."

In *Crutcher* v. *Hind and wife*, 4 Bush 363, the same court held that a proceeding by a Kentucky creditor to enforce his lien on land situated in that state was not interdicted, notwithstanding the existence of the war and the residence of the debtors within the Confederate lines. The Supreme Court of the United States in the case of *Mc Veigh* v. *The United States*, 11 Wall. 259, after citing *Albritche* v. *Leissmann*, 2 Ves. and Bea. 324, Bacon's Abridgment and Story's Equity Pl. § 53, for authority, say: "Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued."

It is contended that the case of *Dean* v. *Nelson*, 10 Wall. 158, asserts a contrary doctrine. That case was a proceeding within an insurrectionary district, but held by the national military forces, in a court established by military orders alone. It was a proceeding to foreclose a mortgage on personal property, and it was instituted against parties who had been expelled by military force from their residence and who were forbidden absolutely by the order which expelled them from coming back again within the lines of the military authority which organized the court. They were not voluntarily within the Confederate lines, but were sent there against their will, and inasmuch as without their consent and against their

will, they were thus driven from their homes and forbidden to return by the arbitrary act of the military power, it was held that a judicial decree by which their property was sold during the continuance in force of this order was void as to them.

But in the subsequent case of *Ludlow* v. *Ramsey*, 11 Wall. 581, it was adjudged that the doctrine of *Dean* v. *Nelson* that a judicial proceeding on a mortgage carried on within the Union lines against a person driven by way of retaliation for outrages committed by others outside of those lines, and prohibited from returning within them, did not apply to a person who went and remained voluntarily in rebellion. Such a person could not complain of legal proceedings regularly prosecuted against him as an absentee.

But there is another aspect in which this case must be considered, and which is really the principal point, and upon which I would have been satisfied to have placed it had not the counsel for the defendants in error, plaintiffs in the court below, insisted in their briefs that the war produced an entire suspension of all proceedings whatever between the citizens of the respective sides, and avoided all judicial process. The sale was made under a deed of trust, containing an agreement that in default of payment when the notes matured, the trustee, upon giving the requisite notice, should proceed to sell the property to satisfy the debt. It contained a power coupled with an interest which was irrevocable in its character, and when the contingency arose calling forth its execution, the trustee was authorized to execute it regardless of the status of the grantors at the particular time. So as far as the authority of the trustee was concerned to go on and make a sale of the property in satisfaction of the debt, it made no difference whether the grantors were in the Confederate lines or in the jungles of India, or even if they were dead. It may be conceded that they were in a place or in a condition where it was physically impossible for notice to reach them, but that would not alter the case, as the notice was not designed to be given for their benefit in the sense of notice to them. It was intended to notify the community that the sale would take place in order that bidders might be present to purchase the property.

In the case of *Beatie* v. *Butler*, 21 Mo. 213, it appears that Beatie borrowed a certain sum of money, and, to secure its payment, he executed a mortgage on real estate containing a power of sale. Before the note was paid off Beatie died, and after his death

the mortgagee sold the property. Neither the widow nor children of Beatie were notified of the sale. Afterwards they moved to set aside the sale, but the court denied the motion, holding that the death of the mortgagor did not extinguish or suspend the power of sale in the mortgage. SCOTT, J., in writing the opinion of the court, says: "The argument that the death of Beatie should have suspended all proceedings under the mortgage, in analogy to the suspension of all process of execution under the administration law against the estate of defendants, cannot be maintained. The law may suspend its own process. As it gives the process, it may regulate it. But deeds of trust and mortgages, with a power of sale, arise from the consent and agreement of parties, and there is no propriety in depriving creditors of the fruits of their foresight and caution. The statute of the 25th of January 1847 is an answer to the argument. That statute, notwithstanding the death of the grantor in a deed of trust, recognises a right of sale in the trustee, though it is postponed for nine months after the death of the maker of the deed."

The precise question now under consideration arose in *Harper et al.* v. *Ely et al.*, 56 Ill. 179, where the court decided that the remedy of the holder of a mortgage in that state to make sale of the mortgaged premises in case of default, under a power in the mortgage, was in no wise impaired or suspended during the existence of hostilities in the late war of the rebellion on account of the residence of the mortgagor and his grantee subsequent to the mortgage within the rebellious states; and that the rule applied as well to the grantee of the mortgage, who always resided within one of the states which, after conveyance to him, joined in the rebellion, as to the mortgagor himself, who, after making the mortgage, left his residence in one of the loyal states for the purpose of engaging in hostilities against the government.

The very recent decision of the Supreme Court of the United States in *Washington University* v. *Finch et al.*, reported in the Central Law Journal No. 6, 1874, is in point. In that case the facts are that Daly and Chambers purchased of W. G. Eliot in March 1860, certain real estate in the city of St. Louis, and gave a deed of trust to secure the purchase-money. In this deed Ranlett was trustee. The purchasers were citizens and residents of Virginia. Ranlett, as trustee, advertised and sold the premises in December 1862, after the establishment of non-intercourse between

the government and the Confederate States. The United States Circuit Court declared the sale to be unlawful because of the non-intercourse, and set aside the deed made by the trustee. The Supreme Court unanimously reversed the judgment, and directed the Circuit Court to dismiss the bill. Mr. Justice MILLER, who wrote the opinion, in commenting upon *Dean* v. *Nelson*, *supra*, said that the court had "never decided nor intentionally given expression to the idea that the property of citizens of the rebel states, located in the loyal states, was, by the mere existence of the war exempt from judicial process for debts due to citizens in the loyal states contracted before the war." Upon the merits of the immediate case under consideration, the learned judge remarked: "The debt was due and unpaid. The obligation which the trustee had assumed on a condition had become absolute by the presence of that condition. If the complainants had been dead, the sale would not have been void, for that reason, if made after the nine months, which a statute of Missouri suspends the right to sell in such cases. If they had been in Japan, it would have been no legal reason for delay. The power under which the sale was made was irrevocable. The creditors had both a legal and a moral right to have the power, made for its benefit, executed. The enforced absence of the complainants, if it be conceded that it was enforced, does not, in our judgment, afford a sufficient reason for arresting his agent and the agent of the creditor in performing a duty which both of them imposed on him before the war began. * * * The interest of the complainants in the land might have been liable to confiscation by the government; yet we are told that this right of the creditor could not be enforced, nor the power of the trustee lawfully exercised. No authority in this country or any other is shown us for this proposition. It rests upon inference from the general doctrine of absolute non-intercourse between citizens of states which are in a state of public war with each other, but no case has been cited of this kind even in such a war.

It is said that the power to sell in the deed of trust required a notice of the sale in a newspaper; that this notice was intended to apprise the complainants of the time and place of sale, and that, as it was impossible for such notice to reach the complainants, no sale could be made. If this reasoning were sound, the grantors in such a deed need only go to a place where the newspapers could not reach them to delay the sale indefinitely or defeat it

altogether. But the notice is not for the benefit of the grantor in the sense of notice to him. It is only for his benefit by granting notoriety and publicity of the time, terms and place of sale, and of the property to be sold, that bidders may be invited, competition encouraged and a fair price obtained for the property. As to the grantor, he is presumed to know that he is in default and his property liable to sale at any time, and no notice to him is required. * * * We are of the opinion that the sale of the trustee in the case under consideration was a lawful and valid sale, and that complainants' bill should have been dismissed."

This argument, it seems to me, is unanswerable, and is so remarkably clear and satisfactory that nothing remains to be added. The judgment is reversed and the petition dismissed.

NAPTON and ADAMS, JJ., dissented.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

COURT OF CHANCERY OF NEW JERSEY.[2]

ASSUMPSIT. See *Vendor and Purchaser.*

Waiver of Fraud and Action on Implied Contract.—Where a person has unlawfully procured and sold securities belonging to another, the principal and interest of which is capable of being ascertained by computation, the owner from whom they have been taken, may waive the fraud in the conversion of the bonds, and claim as on an implied contract: *Allen* v. *United States*, 17 Wall.

CIVIL RIGHTS.

Colored Persons in Railroad Cars.—An Act of Congress passed in 1863, which gave certain privileges which it asked to a railroad corporation, enacted also that "no person shall be excluded from the cars on account of color." *Held*, that this meant that persons of color should travel in the same cars that white ones did, and along with them in such cars: *Railroad Company* v. *Brown*, 17 Wall.

COLORED PEOPLE. See *Civil Rights.*

COMMON CARRIER.

Negligence.—Cannot stipulate for exemption from responsibility for the negligence of himself or his servants: *Railroad Co.* v. *Lockwood*, 17 Wall.

The rule applies to the case of a drover, travelling on a stock train to look after his cattle, and having a free pass for that purpose: *Id.*

[1] From J. W. Wallace, Esq., Reporter; to appear in vol. 17 of his Reports.

[2] From C. E. Green, Esq., Reporter; to appear in vol. 9 of his Reports.